DR LEE CHONG MENG

v.

RETURNING OFFICER (ABDUL RAHMAN ABDULLAH) & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[ELECTION PETITION NO: PP-1-2000]
11 MAY 2000

CONSTITUTIONAL LAW: *Courts - Stare decisis - Whether lower court bound by Privy Council*

ELECTION: *Petition - Service - Whether service proper - Interpretation of rules pertaining to election - Election Petition Rules 1954, rr. 10, 15*

WORDS & PHRASES: *"May be effected" - Election Petition Rules 1954, r. 15 - Whether mandatory - Object and purpose of statute*

The petitioner in this case was a candidate in the Parliamentary Constituency of Bukit Bintang in the General Election held on 29 November 1999. The 1st respondent is the returning officer, the 2nd respondent is the Commission and the 3rd respondent is the returned candidate for the constituency. On 29 March 2000 the 1st and 2nd respondents were struck out as being persons who were not proper and necessary parties to the petition.

The 3rd respondent had not availed himself of r. 10 and the court file revealed that the petitioner had posted a notice at the High Court notice board as stipulated by r. 15, but instead of leaving a copy of the petition with the court as required, proceeded to effect personal service of the petition on him.

The issues for consideration therefore are: (a) whether a petition may still be served personally if the respondent had not availed himself of r. 10; (b) whether the mandatory requirement of r. 15 had been waived if the 3rd respondent had accepted personal service.

It was argued by counsel for the petitioner that no service could be better than personal service and even if personal service was not contemplated by r. 15, then service had still been regularly effected by the notice and the copy of the petition having been left with the court even though it was not in the court file. Alternatively, it was argued that the 3rd respondent had waived service as required by r. 15 by accepting the personal service of the petition, by filing his notice of appointment of solicitors and by appearing in court on two occasions without raising the issue of improper service.

Held:

[1] Although inferior courts are bound by decisions of the Privy Council even if they are *per incuriam*, they are not bound by propositions of law incorporated into the *ratio decidendi* which had merely been assumed to be correct without argument. A case is only authority for what it actually decides.

[2] The manner of interpreting the word 'may' in a statutory provision depends to a large extent on the object and purpose of the statute where it appears. The statutory requirements of an election petition must be strictly observed because an election dispute is a statutory proceeding unknown to the common law or equity.

[2a] The object of the special modes of service coupled with the manner in which election laws must be construed contemplate a strict interpretation of r. 15. The phrase 'may be effected' in r. 15 therefore is mandatory and only refers to a choice of the methods of service that are available to a petitioner. As the rule is mandatory and exhaustive, it cannot therefore accommodate personal service as it is not enumerated therein.

[3] Waiver of a mandatory requirement depends on whether the obligation imposed is for the benefit of a particular person or the public at large. If the benefit is for a particular person he can elect not to require strict compliance with the relevant law. On the other hand, if a law imposes an obligation in mandatory terms in the public interest, waiver of that obligation is not possible.

[3a] Pursuant to the mandatory nature of the modes of service of an election petition, knowledge by a respondent of its precise mode of service will enable him to ascertain whether it has been effected in accordance with r. 15 so as to apply to have it dismissed if it is not so thereby resulting in a speedier disposal of the dispute. The modes of service of a petition are thus not a matter that only affects the parties themselves. There could not therefore be a waiver of the mandatory requirement of r. 15.

[3b] In any event the party renouncing a right must have been in a position to appreciate what his true legal rights were. The facts disclosed that the 3rd respondent was not aware of his legal rights when he accepted the petition. As there can be a waiver only from an intention to give up a right there can be no waiver in this case as the 3rd respondent did not know his true legal right.

[4] Even if r. 15 allows personal service, the service of petition in the instant case could not be said was done regularly. This is because the petition was served without a valid notice of presentation of the petition. The absence of notice of presentation of the petition is fatal to the service of the petition and renders it a nullity. Therefore there was no valid personal service of the petition on the 3rd respondent.

[Petition dismissed.]

Case(s) referred to:

Allison Ltd v. Limehouse & Co [1992] 2 AC 105 ***(foll)***

Badiaddin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***

Baker v. The Queen [1975] AC 774 ***(foll)***

British Wagon Co v. Gray [1896] 1 QB 35 ***(refd)***

Chapman v. Michaelson [1908] 2 Ch 612 ***(foll)***

Chong Thain Vun v. Watson & Anor [1968] 1 MLJ 65 ***(refd)***

Dato' Abdullah Md Derus v. The Election Commission & Anor (Kuantan High Court, Election Petition No 26-1-2000) ***(refd)***

Devan Nair v. Yong Kuan Teik [1967] 1 MLJ 261 ***(not foll)***

Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd [1996] 1 CLJ 141 ***(refd)***

Essex County Council v. Essex Incorporated Congregational Church Union [1963] AC 808 ***(refd)***

Eu Finance Bhd v. Lim Yoke Foo [1982] 2 MLJ 57 ***(refd)***

EG Tan & Co v. Tan Chung Sen [1993] 1 MLJ 262 ***(refd)***

Federal Hotel Sdn Bhd v. National Union of Hotel, Bar and Restaurant Workers [1983] 1 MLJ 175 ***(refd)***

Harcharan Singh v. Mohinder Singh AIR [1968] SC 1500 ***(refd)***

Howard v. Bodington [1877] 2 PD 203 ***(refd)***

Hugh Siak Meng & Anor v. Daing Ibrahim [1975] 4 MC 275 ***(refd)***

Hunter v. Hunter [1919] VLR 153 ***(refd)***

Jarvis v. Hemmings [1912] 1 Ch LR 462 ***(refd)***

Kekatong Sdn Bhd v. Bank Bumiputra (M) Bhd [1998] 2 CLJ 266 ***(foll)***

Lee Sock Goh v. Straits Cabaret (1953) Ltd [1965] 2 MLJ 3 ***(refd)***

Liverpool Borough Bank v. Turner [1860] 30 LJ Ch 379 ***(refd)***

Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower & Anor [1983] 2 CLJ 7 ***(refd)***

Muip Talib v. Dato' James Wong [1971] 1 MLJ 246 ***(refd)***

Muniandy Thamba Kaunder v. D & C Bank Bhd [1996] 2 CLJ 586 ***(refd)***

Noseworthy v. The Overseers of Buckland-in-the-Moor [1874] LR 9 CP 233 ***(refd)***

NP Ponnuswami v. Returning Officer Namakkal AIR [1952] SC 64 ***(refd)***

Pio v. Smith [1987] LRC (Const) 250 ***(not foll)***

PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd [1958] MLJ 113 ***(refd)***

Quinn v. Leathem [1901] AC 459 ***(refd)***

R v. Warner 1 Keb 66 ***(refd)***

Ramely Mansor v. Suruhanjaya Pilihanraya Malaysia & Ors (Kuala Lumpur High

Court, Election Petition No PP-2-2000) ***(refd)***
Re Burrand Dominion Election [1901] 22 CLT 10 ***(refd)***
Re Sharpley & Manby's Arbitration [1942] 1 All ER 66 ***(refd)***
Re Tan Tye, decd [1936] MLJ 141 ***(refd)***
Re Telok Blangah Election Petition [1981] 1 MLJ 278 ***(refd)***
Rhina Bhar v. Karpal Singh [1995] 4 CLJ 642 ***(refd)***
Sabdin Ghani v. Mohd Saidi Lampoh [1983] 2 MLJ 61 ***(refd)***
Sashidaran & Anor v. Magnum Finance Bhd [1998] 3 CLJ Supp 325 ***(refd)***
Satya Narain v. Dhuja Ram & Ors AIR [1974] SC 1185 ***(refd)***
Singh v. Atombrook Ltd [1989] 1 All ER 385 ***(refd)***
Stevens v. Tillett [1870] LR 6 CP 147 ***(refd)***
Stylo Shoes Ltd v. Prices Tailors Ltd [1959] 3 All ER 66 ***(refd)***
SS Construction Pty Ltd v. Ventura Motors Pty Ltd [1964] VR 229 ***(refd)***
Tan Kang Hwa v. Safety Insurance Co Ltd [1972] 1 MLJ 87 ***(refd)***
Tengku Korish v. Mohamed Jusoh & Anor [1970] 1 MLJ 6 ***(foll)***
The Department of Agriculture for Scotland v. Goodfellow [1931] SC 556 ***(refd)***
Tighy v. Putler [1949] (1) SA 1087 (T) ***(refd)***
Walter v. Rumbal 1 LD Raym 54 ***(refd)***
Williams v. Mayor of Denby & Ors [1879] LR 5 CPD 135 ***(refd)***
Woodworth v. Borden [1879] 3 R & C 571 ***(refd)***
Yong Kuan Teik v. Devan Nair [1965] 2 MLJ 162 ***(refd)***
Yusuf Abdul Rahman v. Abdul Ajis Abdul Majeed & Anor [2000] 5 CLJ 215 ***(refd)***

Legislation referred to:
Election Petition Rules 1954, rr. 3(2), 6, 10, 15, 35

Other source(s) referred to:
Interpretation of Statutes, Bindra, 7th edn, p 680
Interpretation of Statutes, Maxwell, 11th edn, p 375
Statutory Interpretation, Francis Bennion, 2nd edn, p 40

For the petitioner - Muhammad Shafee Abdullah (Cheong Wee Wong & Burhanudeen Abdul Wahid with him); M/s Shafee & Co
For the 1st & 2nd respondents - Amarjeet Singh SFC
For the 3rd respondent - Karpal Singh (Gobind Singh Deo with him); M/s Karpal Singh & Co

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul J:

The petitioner in this case is Dr Lee Chong Meng who was a candidate in the Parliamentary Constituency of Bukit Bintang in the General Election held on 29 November 1999. The respondents were the returning officer (the first respondent), the Election Commission (the second respondent) and the returned candidate, Fong Kui Lun (the third respondent), for the constituency. On 29 March 2000 I struck out the first and second respondents as being persons who are not proper and necessary parties to

the petition. At the same time I intimated to the parties that the petition does not appear to have been regularly served on the third respondent as required by rr. 10 and 15 of the Election Petition Rules 1954 ("r. 10" and "r. 15"). This is because a perusal of the court file revealed that as the third respondent had not complied with r. 10 the petitioner had posted a notice on the High Court notice board as stipulated by r. 15 but, instead of leaving a copy of the petition with the court as required, proceeded to effect personal service of the petition on him. Proper service of the petition is a condition precedent to the jurisdiction of the court (see *Chong Thain Vun v. Watson & Anor* [1968] 1 MLJ 65). As Maxwell on *Interpretation of Statutes* 11th edn says at p. 375:

> Where, however, the act or thing required by the statute is a condition precedent to the jurisdiction of the tribunal, compliance cannot be dispensed with, and if it be impossible the jurisdiction fails. It would not be competent for a court to dispense with what the legislature had made the indispensable foundation of its jurisdiction.

Jurisdiction cannot be established by consent where it does not exist (see *Federal Hotel Sdn Bhd v. National Union of Hotel, Bar and Restaurant Workers* [1983] 1 MLJ 175; *Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower and Anor* [1983] 2 MLJ 54). Thus in *Essex County Council v. Essex Incorporated Congregational Church Union* [1963] AC 808 it was held that a court cannot be given jurisdiction by the waiver of conditions that would otherwise preclude its having jurisdiction. It is settled law that an objection as to jurisdiction may be taken at any stage of the proceedings (see *Re Tan Tye, Decd* [1936] MLJ 141). It must be observed that a judgment given without jurisdiction deprives it of any effect (see *Lee Sock Goh v. Straits Cabaret (1953) Ltd* [1965] 2 MLJ 3). The person whom the judgment purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside (see *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 57; *Badiaddin bin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd* [1998] 2 CLJ 75). It is the duty of the court to ensure that parties do not contract out of a duty so as to prevent an improper order being made (see *Statutory Interpretation* by Francis Bennion 2nd edn at p. 40). I therefore invited parties to submit on this issue and fixed the case for further hearing.

The petitioner, in order to show that he had complied with r. 15, filed two affidavits. They are encls. 27 and 33 of the court file. According to encl. 27 the petitioner filed seven copies of the petition on 10 February 2000. A notice of presentation of the petition was also filed on the same day. Paragraph 9 of the affidavit then goes on to say that:

> On 14.02.2000 we were informed that the said Petition Pilihanraya had been sealed

and is ready for collection from the clerk at the said Registration Office. We duly collected the (five) 5 sealed copies of the said Petisyen Pilihanraya on the same day. I personally informed the said clerk that the extra sealed copy was meant to be given to any of the respondents requesting for a copy of the Petisyen Pilihanraya in pursuant to the Notis Penyampaian and if more sealed copies are needed to inform us at our office by phone.

On 21 February 2000 a copy of the petition together with the notice of presentation of the petition was personally served on the third respondent at a time fixed by the latter. In the meanwhile the petitioner had posted a sealed copy of the petition together with the notice of presentation of the petition on the notice board of the High Court on 17 February 2000. On 18 February 2000 the petitioner issued a new notice of presentation of the petition to incorporate a statement that a copy of the petition may be obtained on application at the office of the registrar of the High Court, Kuala Lumpur. The new notice was posted on the notice board of the High Court at Kuala Lumpur on 23 February 2000. A copy thereof was served personally on the third respondent on 28 February 2000. Enclosure 33 was affirmed by a clerk attached to the High Court. He said that he had seen a copy of the petition in this case a number of times in the document tray at the High Court registry along with other extra documents of other cases which had not been collected by parties. He added that he first noticed the copy of the petition in the middle of February 2000 and the last time he saw it was about two or three weeks prior to 5 April 2000. Paragraph 17 of encl. 27 says this:

Based upon the above facts it is clear that the court had, at all material time, 2 sealed copies of the said Petisyen Pilihanraya over and above that required by the court, that is a full set which has been posted on the notice board of the High Court and a further set which was left with the court's registry when the said Petisyen Pilihanraya were collected by us on 14.02.2000.

In his submission before me Encik Muhammad Shafee Abdullah, learned counsel for the petitioner, then referred to r. 10 and r. 15. Both the rules read as follows:

rule 10

Any person returned may at any time, after he is returned, send or leave at the office of the Registrar a writing, signed by him, appointing an advocate to act for him in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within Malaysia at which notices addressed to him may be left. Every such writing shall be stamped with the duty payable thereon under the law for the time being in force.

rule 15

> Notice of the presentation of a petition, accompanied by a copy thereof, shall, within fifteen days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the advocate appointed by the respondent under rule 10 or by posting the same in a registered letter to the address given under rule 10 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address given, by a notice published in the Gazette or in a newspaper circulating within the constituency or electoral ward in which the election was held, or posted on the notice board of the High Court in the State in which that constituency or electoral ward is situated, stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar.

The main thrust of the argument of learned counsel was that even when the respondent had not availed himself of r. 10 a petition may still be served personally. In support of this stand he referred to *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261 where Lord Upjohn, in referring to a situation where a respondent had not availed himself of r. 10, said at p. 264:

> Rule 15 was not complied with strictly for there was no personal service and no notice in the Gazette within 10 days of the presentation of the petition.

Learned counsel then referred to *Chong Thain Vun v. Watson & Anor* [1968] 1 MLJ 65; *Muip bin Talib v. Dato James Wong* [1971] 1 MLJ 246; *Sabdin Ghani v. Mohd Saidi Lampoh* [1983] 2 MLJ 61; *Rhina Bhar v. Karpal Singh* [1995] 4 CLJ 642 and *Re Telok Blangah Election Petition* [1981] 1 MLJ 278 where, in reliance on *Devan Nair,* it was held that there may be personal service of a petition when r. 10 has not been complied with. A similar view was also expressed in *Yusuf Abdul Rahman v. Abdul Ajis Abdul Majeed & Anor* [2000] 5 CLJ 215. Learned counsel then referred to cases such as *Walter v. Rumbal* 1 LD Raym 54 and *Jarvis v. Hemmings* [1912] 1 Ch LR 462 to argue that no service can be better than personal service. He submitted that even if personal service is not contemplated by r. 15 then service has still been regularly effected by the notice and the copy of the petition having been posted on the High Court notice board with a copy of the petition having been left with the court even though it is not in the court file. As he said in his written submission:

> (b) It is important to note that all together 3 copies of sealed Petitions complete with Notice of Presentation and Notice of Appointment of Advocates were provided to the Court:
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> i) one for the Court's copy;
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> ii) one for the Notice Board;
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> iii) one for service in case Respondent 3 were to ask for one.
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> With respect to (b) alone, it is clear that strictly the Petition need not have to

be posted on the Board. But the Court consented to the full sealed petition being posted on the Board. This copy on the Notice Board is within the supervision, control and direction of the relevant Registrar during the period of 15 days service at least (the documents were up on the Board until about 2½ weeks ago). Strictly speaking therefore this was an additional copy the Registrar had in his possession that he could use for service should Respondent 3 ask for it. This by itself is in full compliance of Rule 15.

In any event, learned counsel added, the third respondent had waived service as required by r. 15 by accepting personal service of the petition; by filing his notice of appointment of solicitors and by appearing in court on two occasions without raising the issue of improper service. In support of the argument that the irregularity, if any, had been waived he referred to cases such as *Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd* [1996] 1 CLJ 141; *EG Tan & Co v. Tan Chung Sen* [1993] 1 MLJ 262 and *Muniandy a/l Thamba Kaunder v. D & C Bank Bhd* [1996] 2 CLJ 586. In his reply Encik Karpal Singh, learned counsel for the third respondent, said that the statement in *Devan Nair* approving personal service was made without argument and is therefore not binding. He said that the modes of service prescribed by r. 15 must be construed as being mandatory with the result that there can be no personal service of an election petition. Such being the case the question of whether the third respondent was prejudiced or not does not arise. He added that there is no provision in the election laws for amendment of documents. As such the amendment of the notice of presentation of the petition is not valid. He concluded by saying that even though the amended notice of presentation of the petition was posted on the High Court notice board within the 15-day period it is still bad as the requirement to put it up had already been complied with.

The resolution of the issue before me first raises the question of whether the modes of service prescribed by r. 15 read with r. 10 are mandatory and therefore exhaustive. In substance r. 10 states that a person returned may send or leave at the office of the registrar a writing, signed by him, appointing an advocate to act for him in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within Malaysia at which notices addressed to him may be left. Rule 15 is in two parts. The first part states that the notice of presentation of a petition, accompanied by a copy thereof shall be served by the petitioner on the respondent within fifteen days of the presentation of the petition. This has been held to be mandatory by the Privy Council in *Devan Nair* and non-compliance with the time period makes the petition a nullity. The second part prescribes the modes of service. They are, firstly, the notice of presentation of the petition and copy aforesaid may be

delivered to the advocate appointed under r. 10 or by posting the same in a registered letter to the address given ("the first method of service"). Secondly, if no advocate has been appointed, or no address given service may be effected by a notice published, *inter alia,* in the Gazette stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the registrar ("the second method of service"). I pause to add that the first part of r. 15 cannot be taken to relate to any mode of service as the second part, by the use of the phrase "such service … ", takes the modes of service out of the ambit of the first part which is therefore confined in its meaning to only the time of service. What requires determination is whether the two methods of service are mandatory. If they are not mandatory then the prescribed modes are not exhaustive in which event the documents may be served by personal service. The phrase "may be effected" in the second part of r. 15 may appear to suggest that the prescribed modes of service are not exhaustive. However, its effect depends on certain rules of construction. In this regard I refer to Bindra's *Interpretation of Statutes* 7th edn, which says at p. 680:

> It is well settled that the use of word 'may' in a statutory provision would not by itself show that the provision is directory in nature. In some cases the legislature may use the word 'may' as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word 'may' the court has to consider various factors, namely the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word and the like. It is equally well settled that where the word 'may' involves a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief or where giving the word a directory significance, would defeat the very object of the Act, the word 'may' should be interpreted to convey a mandatory force.

I also refer to *Kekatong Sdn Bhd v. Bank Bumiputra (M) Bhd* [1998] 2 CLJ 266 where the Court of Appeal referred to *Liverpool Borough Bank v. Turner* [1860] 30 LJ Ch 379 in which Lord Campbell CJ said at p. 380:

> No universal rule can be laid down … . It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

And to *Howard v. Bodington* [1877] 2 PD 203 where Lord Penzance said at p. 211:

> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory …. .
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> I have been very carefully through all the principal cases but upon reading them all, the conclusion at which I am constrained to arrive is this, that you cannot glean a great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of *Liverpool Borough Bank v. Turner* [1860] 30 LJ Ch 379.

It is therefore clear that the manner of interpreting the word "may" in a statutory provision depends to a large extent on the object and purpose of the statute where it appears. It was the failure "… to have sufficiently appreciated this point of construction …" (at p. 454) that led the Court of Appeal in *Kekatong* to decline to follow *Singh v. Atombrook Ltd* [1989] 1 All ER 385 which had followed cases such as *Re Sharpley and Manby's Arbitration* [1942] 1 All ER 66 and *Stylo Shoes Ltd v. Prices Tailors Ltd* [1959] 3 All ER 66 to rule that the phrase "may be served" in a service provision was permissive. It is thus necessary to study the characteristic features of election laws in order to appreciate the significance of the phrase "may be effected" in the second part of r. 15.

It has been accepted that strictly speaking, it is the sole right of the legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it (see *NP Ponnuswami v. Returning Officer, Namakkal* AIR [1952] SC 64). In this regard I refer to *Stevens v. Tillett* [1870] LR 6 CP 147 where Bovill CJ said at p. 155:

> The jurisdiction of this Court as regards the trial of election petitions, depends entirely upon the Parliamentary Elections Act, 1868; and the decisions of the election judges must be governed by the provisions of that statute.

As Goswani J said in *Satya Narain v. Dhuja Ram & Others* AIR [1974] SC 1185 at p. 1190 the right to challenge an election:

> … is a special right conferred under a self-contained special law and the court will have to seek answer to the questions raised within the four corners of the Act and the powers of the court are circumscribed by its provisions. It is not a common law right and an election petition cannot be equated with a complaint in a civil suit.

Therefore the statutory requirements of an election petition must be strictly observed because an election dispute is a statutory proceeding unknown to the common law or equity (see *Harcharan Singh v. Mohinder Singh* AIR [1968] SC 1500). As Raja Azlan Shah J (as His Highness then was) said in *Tengku Korish v. Mohamed bin Jusoh & Anor* [1970] 1 MLJ 6 at pp. 6-7:

> It is well recognised that I must not go outside the province of the election law. The Election Offences Act 1954 confers certain rights and provides a remedy for enforcing those rights. Where that is the case, the remedy provided by that statute only must be availed of. Wills J stated this rule with great clarity in *Wolverhampton New Waterworks Company v. Hawkesford* 6 CB (NS) 336; 141 ER 486, 495 in the following passage:
>
> > There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, *viz,* where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.
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> The present cases fall within the latter class.
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> The rules cited in this passage was approved by the House of Lords in *Neville v. London Express Newspaper Ltd* [1919] AC 368 and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago v. Gordon Grant & Company* [1935] AC 532.
>
> What 'right' does the Election Offences Act, 1954 confer, using the word 'right' in its broad sense? In my judgment, the right conferred by that Act is a special kind of right unknown to the common law or equity, and the court which administers it possesses a special kind of jurisdiction (see *Theberge v. Laudry* [1876] 2 App Cas 102, *Goonesinha v. Hon C I de Kretser* [1945] AC 63 or what is said in *Arzu v. Arthur* [1965] WLR 675 as a peculiar jurisdiction). It is not a civil right but a creature of statute or special law and must be subject to the limitations imposed by it (see *Ponnuswami v. Returning Officer, Nammakkal Constituency & Ors* [1952] SCR 218).
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> The statutory requirements of election laws are mandatory and must be strictly observed: see *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261, *Harcharan Singh v. Mohinder Singh* AIR [1968] SC 1500 and *Chong Thain Vun v. Watson & Anor* [1968] 1 MLJ 65.

Thus it is well-established that the right of a person to file an election petition is derived from a specific statute relating to election and that any procedure laid down by such a special statute shall be strictly adhered to as it is mandatory (see also *Hugh Siak Meng & Anor v. Daing Ibrahim* [1975] 4 MC 275). The corollary is that the modes of service prescribed in r. 15 must be complied with. In *PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd* [1958] MLJ 113 it was held that where the law provides a particular method or form of procedure for effecting service, or a particular place at which, or to which, service may be effected, then there must be strict compliance with these provisions. As r. 15 is part of the special law that gives jurisdiction to the court to entertain an election petition parties cannot contract out of it (see also *British Wagon Co v. Gray* [1896] 1 QB 35). With regard to service of an election petition by way of personal service it must be observed that that mode of service is not part of r. 15. It is of common law origin and has been incorporated into the Rules of the High Court 1980 ("the RHC"). The authorities that I have referred to make it clear that common law does not apply to the election laws. In a previous judgment in this case I have explained that the RHC has no application to the law relating to election petitions. It follows that an election petition may not be served by way of personal service in the absence of provision having been made to incorporate that mode into the election laws. The rationale underlying this conclusion comes into clear focus upon a consideration of the object of r. 15 read with r. 10. Rule 10 requires the appointment of an advocate or an address for service to be left with the registrar for the service of a petition which is not normally done for service of documents. In the second method of service a copy of the petition is deemed to be served without an order for substituted service to that effect. This is normally not the case for service of documents. The legislative intent behind the wisdom of these special modes of service is closely linked to the fifteen-day period within which an election petition must be served. It may not be possible to serve a petition within a period of fifteen days if it is to be served personally. This is because rules relating to personal service are stringent (see *Sashidaran & Anor v. Magnum Finance Bhd* [1998] 3 CLJ Supp 325) and it would be difficult, if not impossible, to fix a short period of service with that method. It can therefore be seen that r. 15 read with r. 10 has been tailored to meet a special purpose. The modes of service have been prescribed in order to facilitate the service of a petition within the stipulated fifteen-day period. The short time given to serve a petition is, of course, to ensure that it is heard as expeditiously as possible in the public interest. Additionally, just as the late service of an election petition will affect the public interest service of the petition by methods other than those authorised will have a similar bearing by virtue of the fact that more than one petition

may be presented against a candidate. Once a petition has been served on a candidate by personal service he may cease to look out for other petitions that may be served as authorised. This will affect the operation of r. 6 of the Elections Petition Rules 1954 and thereby cause delays in the disposal of the petition. Thus the object of the special modes of service coupled with the manner in which election laws must be construed contemplate a strict interpretation of r. 15. The phrase "may be effected" in r. 15 is mandatory and only refers to a choice of the methods of service that are available to a petitioner. In this regard I refer to *The Department of Agriculture for Scotland v. Goodfellow* [1931] SC 556 where Lord Justice Clerk said at p. 559:

> I am clearly of opinion that r. 113 is not enabling in its character, but is exhaustive. In other words, the word 'may' in that rule, in my judgment, imports a choice which is limited to these three methods. There is a choice as between any of the three. There is no choice outside of the three. Neither party is at liberty to invent a new method, and to superadd it to those which are included in the rule. … If the pursuers were right, the whole thing would be thrown loose, and a notice might be served by a taxi-driver or an office boy, or by many other methods which might be conceived, but which receive no sanction whatever from the terms of r. 113.

An election petition must therefore be served only in accordance with the methods laid down in r. 15 as the rule is mandatory and exhaustive. At this stage it is pertinent to refer to *Woodworth v. Borden* [1879] 3 R & C 571 where it was held that an election petition served upon the respondent by the petitioner was bad as it should have been made by the sheriff (see also *Noseworthy v. The Overseers of Buckland-in-the-Moor* [1874] LR 9 CP 233). In the circumstances I am unable to agree, and with the greatest respect, with the statement made in *Devan Nair* that there may be personal service of an election petition within the meaning of r. 15. It must first be observed that the Privy Council said in other parts of the judgment that "… a petition must be served in accordance with the terms of r. 15 …" (at p. 264) and that "… the provisions of rule 15 are mandatory …" (at p. 265). Thus in *Kekatong* Gopal Sri Ram JCA said at p. 454:

> In any event, there is at least one case which has interpreted 'may' as 'must' in relation to service of process. In *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261, the Privy Council construed the words 'such service may be effected' appearing in r. 15 of the rules contained in the second schedule to the Election Offences Ordinance 1954 as a mandatory requirement.

If a petition must be served in accordance with the provisions of r. 15 which is mandatory then the rule cannot accommodate personal service as it is not enumerated therein. The statement made by the Privy Council is therefore inconsistent with its interpretation of r. 15. In any event the

question of personal service was not in issue before the Privy Council and the statement relied on by learned counsel was made without any argument. In *R v. Warner* 1 Keb 66 it was held that "precedents *sub silentio* and without argument are of no moment". In *Baker v. The Queen* [1975] AC 774 the Privy Council held that although inferior courts were bound by decisions of the board even if they were *per incuriam* they were not bound by propositions of law incorporated into the *ratio decidendi* which had merely been assumed to be correct without argument. That is the position of the statement in question. Furthermore, the statement by the Privy Council relating to personal service is not the *ratio decidendi* of the case as the case was concerned with the time and not the mode of service. It is settled law that a case is only authority for what it actually decides (see *Quinn v. Leathem* [1901] AC 459). It follows that I am free to depart from *Devan Nair* as I have done, though with extreme reluctance. The corollary is that the personal service of the election petition documents on the third respondent is defective. I pause to add that r. 35 of the Election Petition Rules 1954 must be read as being subject to r. 15 and is applicable only to service of notices and proceedings other than the petition itself.

The resultant matter for consideration is whether the third respondent by accepting personal service of the petition has waived the mandatory requirement of r. 15. The law is well settled with regard to waiver of a mandatory requirement. It depends on whether the obligation imposed is for the benefit of a particular person or of the public at large. If the benefit is for a particular person he can elect not to require strict compliance with the relevant law. This rule is illustrated by *Hunter v. Hunter* [1919] VLR 153 where it was held that a husband could waive certain provisions of the Marriage Act 1915 of Victoria relating to the cost of divorce proceedings as they were for his benefit alone. On the other hand if a law imposes an obligation in mandatory terms in the public interest waiver of that obligation is not possible (see *SS Construction Pty Ltd v. Ventura Motors Pty Ltd* [1964] VR 229.) In *Devan Nair* it was held that it is in the public interest that an election petition be speedily determined. As Lord Upjohn said at pp. 264-265:

> The circumstances which weigh heavily with their Lordships in favour of a mandatory construction are:
>
> (1) The need in an election petition for a speedy determination of the controversy, a matter already emphasised by their Lordships. The interest of the public in election petitions was rightly stressed in the Federal Court, but it is very much in the interest of the public that the matter should be speedily determined.

(2) In contrast, for example, to the Rules of the Supreme Court in this country, the rules vest no general power in the election judge to extend the time on the ground of irregularity. Their Lordships think this omission was a matter of deliberate design. In cases where it was intended that the judge should have power to amend proceedings or postpone the inquiry it was expressly conferred upon him, see for example rules 7, 8 and 19.

(3) If there is more than one election petition relating to the same election or return, they are to be dealt with as one (rule 6). It would be manifestly inconvenient and against the public interest if by late service in one case and subsequent delay in those proceedings the hearing of other petitions could be held up.

(4) Respondents may deliver recriminatory cases (rule 8) and speedy service, in order that the respondent may know the case against him, is obviously desirable so that he may collect his evidence as soon as possible.

With regard to the authorities, for the reasons given in (2) above many of them such as *In re Pritchard* [1963] Ch 502; [1963] 2 WLR 685; [1963] 1 All ER 873, CA do not assist the determination of this case.

In commenting on the public interest element in election petitions Thomson LP said in the Federal Court in *Yong Kuan Teik v. Devan Nair* [1965] 2 MLJ 162 at p. 164:

> It is not a jurisdiction to deal with the rights and obligations of individuals as in the ordinary civil jurisdiction of the court. It is a jurisdiction to deal with matters affecting on the one hand the integrity of the country's legislature and on the other hand the representation in that legislature of constituencies comprising many thousands of electors. As was said by Lord Abinger CB in the case of *Coppock v. Bower* 4 M & W 361, 366 an election petition 'is a proceeding instituted not for the benefit of the individuals, but of the public – and the only interest in it which the law recognises, is that of the public'.
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> In that connection I would quote the following observations of the Privy Council (per Lord Cairns) in the case of *Theberge v. Laudry* [1876-7] 2 App Cas 102, 106 with reference to the corresponding and largely similar legislation in the then Colony of Quebec:
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> > These two Acts of Parliament … are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly.

And again at p. 107:

> the subject matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly.

Much the same thing was said half a century later in the case of *Strickland v. Grima* [1930] AC 285, 296 in relation to the corresponding law in Malta, where Lord Blanesburgh referred to *Theberge v. Laundry, supra,* and said that 'it is pointed out that decisions upon such matters are not decisions of mere ordinary civil rights'.

It must be remembered that in *Devan Nair* the Privy Council was concerned with the public interest element in election petitions only with regard to the time of service. As I said earlier the time and modes of service in r. 15 are inter-linked as it is the very nature of the modes prescribed therein that will facilitate service within the time provided. This inter-dependence makes the modes prescribed of equal importance with the time fixed to ensure speedy determination of the petition. I have discussed earlier the manner in which the modes of service of a petition will affect r. 6 of the Election Petition Rules 1954. Since the modes of service have a bearing on the time of service of a petition they will affect the public interest. Thus the modes of service have also been prescribed in the public interest. There can therefore be no waiver of the mode of service of a petition. I consider it necessary to refer to the Zimbabwe cases of *Tighy v. Putler* [1949] (1) SA 1087 (T) and *Pio v. Smith* [1987] LRC (Const) 250 where it was held that the mode of service is only for the benefit and interests of the parties to the petition and can therefore be modified or waived by them. With respect I am unable to agree. In so saying I refer to *Allison Ltd v. Limehouse & Co* [1992] 2 AC 105 where Lord Goff of Chieveley said at p. 126:

> Furthermore, as Mr Dowley urged upon us, questions of service of proceedings do not affect only the parties themselves; they affect also the administration of justice itself. It is important that those concerned at court offices, and especially those who have to deal with applications for judgment in default, should know precisely what mode of service has been adopted, and therefore be able to know (by reference to the relevant rules of court) the precise date upon which the proceedings are treated as having been served.

This passage illustrates that the mode of service of a petition may be said to affect the public interest if it can be shown that they will have a bearing on its conduct. Pursuant to the mandatory nature of the modes of service of an election petition knowledge by a respondent of its precise mode of service will enable him to ascertain whether it has been effected in

accordance with r. 15 so as to apply to have it dismissed if it is not so thereby resulting in a speedier disposal of the dispute. The modes of service of a petition are thus not a matter that only affects the parties themselves. Even if I am wrong in my conclusion that there can be no waiver of the prescribed modes of service the present stand taken by the third respondent to argue that there can be no personal service of an election petition shows that he was not aware of his legal rights when he accepted the petition. In *Chapman v. Michaelson* [1908] 2 Ch 612 it was held that the party renouncing a right must have been in a position to appreciate what his true legal rights were. As there can be a waiver only from an intention to give up a right there can be no waiver in this case as the third respondent did not know his true legal right.

It was held in *Devan Nair* that the petition must be served within the time period specified even though it had been served in accordance with r. 10 as it then stood and the respondent had appointed solicitors who had obtained an order for the petitioner to deliver certain particulars as the time period cannot be waived. It follows that as the failure to observe the time for service rendered the proceedings a nullity in *Devan Nair* by virtue of the rule being mandatory a failure to comply with the mode of service as provided by r. 15 will equally render the proceedings a nullity for the same reason even though the third respondent had accepted service of the petition.

Be that as it may, a matter of concern is whether the personal service of the petition on the third respondent was done regularly even if it can be argued that such a mode of service is lawful. As I have stated in an earlier part of the judgment when the first method of service is used the petition must be accompanied by a notice of presentation of the petition. In the case of the second method of service the notice of presentation of the petition is substituted with a notice containing certain additional particulars as described in r. 15. As personal service of a petition can be done, if at all, only through the first method of service it would entail service of the copy of the petition together with a notice of presentation of the petition. Accordingly a copy of the petition was served on the third respondent on 21 February 2000 together with what purports to be a notice of presentation of the petition. It reads as follows:

NOTIS PENYAMPAIAN PETISYEN PILIHANRAYA

> Adalah dengan ini diberi notis bahawa Dr Lee Chong Meng yang beralamat di No 16, Tengkat Tong Shin, 50200 Kuala Lumpur, Pempetisyen tersebut telah mengemukakan dengan menyerahkan di pejabat Penolong Kanan Pendaftar Mahkamah Tinggi di Kuala Lumpur, satu Petisyen Pilihanraya terhadap anda Abdul Rahman bin Haji Abdullah Pegawai Pengurus bagi Pilihanraya Bahagian, P.108 Bukit Bintang Kuala Lumpur dan Fong Kui Lun, berhubung dengan Pilihanraya bagi Bahagian Pilihanraya Bukit Bintang, P.108, Kuala Lumpur.

Notis ini adalah ditampalkan di papan notis, Mahkamah Tinggi, Kuala Lumpur, sebagai Penyampaian kepada anda.

Bertarikh 9 haribulan Februari 2000.

On 18 February 2000 this notice was amended as it required further particulars as affirmed in para. 13 of encl. 27. It was then served on the third respondent on 28 February 2000. The fresh notice reads as follows:

NOTIS PENYAMPAIAN PETISYEN PILIHANRAYA

(KAEDAH 15 KAEDAH–KAEDAH PETISYEN PILIHANRAYA 1954)

Adalah dengan ini diberi notis bahawa Dr Lee Chong Meng yang beralamat di No 16, Tengkat Tong Shin, 50200 Kuala Lumpur, Pempetisyen tersebut telah mengemukakan dengan menyerahkan di Pejabat Penolong Pendaftar Mahkamah Tinggi di Kuala Lumpur, satu Petisyen Pilihanraya terhadap anda Abdul Rahman bin Haji Abdullah Pegawai Pengurus bagi Pilihanraya Bahagian, P.108 Bukit Bintang, Kuala Lumpur, Suruhanjaya Pilihanraya dan Fong Kui Lun, berhubung dengan Pilihanraya bagi Bahagian Pilihanraya Bukit Bintang, P.108, Kuala Lumpur.

AMBIL PERHATIAN bahawa satu salinan Petisyen Pilihanraya ini boleh didapati oleh kamu atas permohonan di Pejabat Pendaftar, Mahkamah Tinggi, di Kuala Lumpur.

Notis ini adalah ditampalkan di papan notis, Mahkamah Tinggi, Kuala Lumpur, sebagai Penyampaian kepada anda.

Bertarikh 18 haribulan Februari 2000.

The first matter for observation is that the notice carries an indorsement to the effect that it is posted on the High Court notice board by way of service on, *inter alia*, the third respondent. This means that the petitioner has expressly stated in the notice that service on the third respondent is in accordance with the second method of service. That the petitioner intended the service to be by this method is further supported by para. 9 of encl. 27 whereby the court clerk was informed that the extra sealed copy of the petition was to be given to any of the respondents requesting for a copy pursuant to the notice. The personal service of the copy of petition on the third respondent is therefore only for his information and does not operate as service of the petition. Furthermore, what requires to be served with the copy of the petition in the case of the first method of service is a notice of the presentation of the petition. The notice served on the respondent is not a notice of the presentation of the petition but a notice when the second method of service is adopted. Both notices require different particulars for different purposes and must be strictly followed depending on the mode of service chosen. I say this because any requirement prescribed by an election law must be adopted and adhered to. As Anuar CJ (Malaya), in commenting on the need to comply strictly with the second method of service, said in *Rhina Bhar* at p. 644:

> With respect I am of the view that the statutory requirements of election law are mandatory and must be strictly observed (*Tengku Korish v. Mohamed bin Jusoh & Anor* [1970] 1 MLJ 6). Where a liability is imposed by a statute which at the same time gives a special and particular remedy for enforcing it the remedy provided by the statute must be followed and it is not competent to the party to pursue another course. The form given by the statute must be adopted and adhered to (*Wolverhampton New Waterworks Company v. Hawkesford* 6 CB (NS) 336, 141 ER 486).

The petition was therefore served without a valid notice of presentation of the petition with the result that what was served was only the petition. The absence of a notice of presentation of the petition is fatal to the service of the petition and renders it a nullity (see *Williams v. Mayor of Denby & Ors* [1879] LR 5 CPD 135; *Chong Thain Vun v. Watson & Anor* [1968] 1 MLJ 65). There is therefore no valid personal service of the petition on the third respondent even if it can be argued that r. 15 allows personal service of a petition.

Consequently, the petition against the third respondent will be valid only if the requirements of the second method of service have been strictly complied with. With regard to service of the copy of petition on the third respondent by the second method of service it will be observed that the petitioner had posted the required notice on the notice board of the High Court twice, one on 17 February 2000 and one on 23 February 2000. The first notice was replaced with the second notice as the first was defective by virtue of it not stating that a copy of the petition may be obtained on application from the registrar. I pause to add that a defective notice may be replaced within the time period by a proper notice just as a fresh notice of appeal may be filed to replace a defective notice of appeal as in *Tan Kang Hwa v. Safety Insurance Co Ltd* [1972] 1 MLJ 87. Thus the second notice posted on the notice board by the petitioner is valid. However, what merits consideration is whether the notice complies with r. 15. As Anuar CJ (Malaya) said in *Rhina Bhar* r. 15 requires the petitioner to state in the notice posted on the notice board that:

1) such petition has been presented;

2) a copy of the same may be obtained by the respondent on application at the office of the registrar.

It is clear by now that the statutory requirements of election laws are mandatory and must be strictly observed. The first matter to be stated in the notice is that the petition has been presented. The presentation of a petition means that the petition has been delivered to the court for the purpose of initiating the action. In other words it means that the petition

has been filed in court. However, what the petitioner has stated in the notice posted by him is that "… Pempetisyen tersebut telah mengemukakan dengan menyerahkan di Pejabat Penolong Kanan Pendaftar di Kuala Lumpur, satu Petisyen Pilihanraya terhadap anda …". This means that the petitioner has presented the petition against the persons named by serving it at the office of the senior assistant registrar. There is no requirement in r. 15 for a petition to be served on the registrar. This goes beyond stating that the petition has been presented. The result is that the notice posted on the notice board by the petitioner is not in accordance with the requirements of r. 15 and is therefore void. There is therefore no service of the petition on the third respondent in accordance with the second method of service as it is only a valid notice that will deem the petition to have been served. In this regard I refer to *Dato' Abdullah bin Md Derus v. The Election Commission & Anor* (Kuantan High Court, Election Petition No 26-1-2000) where Hashim Yusof J said at p. 21:

> Pada penelitian saya, tidak ada notis yang telah ditampalkan di Papan Kenyataan Mahkamah. Kegagalan ini menyebabkan tidak ada penyerahan terhadapan responden pertama.

There is another matter that requires consideration with regard to the presentation of election petitions. Rule 3(2) of the Election Petition Rules 1954 ("r. 3(2)") states that:

> There shall also be left with the petition two copies thereof.

In commenting on r. 3(2) I said in *Ramely bin Mansor v. Suruhanjaya Pilihanraya Malaysia and Others* (Kuala Lumpur High Court, Election Petition No PP-2-2000) at p. 6 of the judgment:

> The language of rule 3(2) imposes a statutory obligation on the petitioner to leave two copies of the petition with the Court. Rule 3(2) does not say, as correctly submitted by learned counsel for the third respondent, that the Court shall retain two copies of the petition in which event it will become the responsibility of the Court to do so when more than two copies are filed. The words "… shall also be left …" in rule 3(2) show that it is the obligation of the petitioner to leave the two copies with the Court.

The language employed in r. 3(2) makes it clear that the two copies must be left with the petition at the time of presenting it. The court file did not have the two copies of the petition. The petitioner attempted to explain the existence of the two copies in a somewhat circuitous manner. Paragraph 9 of encl. 27 states, without any challenge, that out of the total number of petitions filed five copies were collected by the petitioner on 14 February 2000. The two copies left behind by the petitioner are one copy of the petition and the original for the use of the court. That is still

short of the two copies required to be left with the petition. The petitioner contends that the other copy of the petition is the one that was posted on the High Court notice board on 14 February 2000. In this regard para. 17 of encl. 27 reads as follows:

> Based upon the above facts it is clear that the Court had, at all material time, 2 sealed copies of the said Petisyen Pilihanraya over and above that required by the Court, that is a full set which has been posted on the Notice Board of the High Court and a further set which was left with the Court's Registry when the said Petisyen Pilihanraya were collected by us on 14.02.2000.

To argue that the copy of the petition posted on the High Court notice board on 14 February 2000 amounts to it being left with the petition is to torture the meaning of r. 3(2). What r. 3(2) requires is for the two copies to be left with the petition. This means that they must be left with the petition at the time it is presented, that is to say, on 10 February 2000. The copy posted on the notice board does not comply with the requirement of r. 3(2) for two reasons. Firstly, it was taken out from the registry and posted on the notice board on 17 February 2000. It was therefore not left with the petition as required. Secondly, posting it on the notice board does not amount to it being left with the petition as contemplated by r. 3(2). I am therefore of the view that there has been no compliance with r. 3(2). The requirement to leave copies of the petition as provided is mandatory and non-compliance with the rule will result in dismissal of the petition (see *Re Burrand Dominion Election* [1901] 22 CLT 10; *Satya Narain v. Dhuja Ram & Others* AIR [1974] SC 1185).

As the third respondent has not been properly served with a copy of the petition I dismiss the petition against him.